Supreme Court, U.S.
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No. 85-1754

*In The*

# Supreme Court of the United States

OCTOBER TERM, 1985

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DENNIS BOBER, et al.,

Appellants,

v.

WALGREEN CO., et al.,

Appellees.

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On Appeal From The Supreme Court Of Illinois

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## MOTION OF WALGREEN CO. TO DISMISS

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Dated: May 23, 1986

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21 pp

## QUESTION PRESENTED

1. Does the requirement that twenty-five percent of the voters sign a petition to initiate a referendum on banning the sale of liquor violate equal protection, or freedom of speech and association?

## STATEMENT PURSUANT TO SUPREME COURT RULE 28(1)

Walgreen Co. has no parent, subsidiary, or affiliate corporations (other than wholly-owned subsidiaries).

Please note that the second word of the company's official name belongs in the abbreviated form, "Co."

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## MOTION OF WALGREEN CO. TO DISMISS

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Pursuant to Rule 16 of this Court, Walgreen Co. moves that this appeal be dismissed. It is manifest that the decision below is correct and that no substantial federal question is presented. The Supreme Court of Illinois properly held that a state statute requiring the signatures of twenty-five percent of the electorate to initiate a referendum does not violate the rights of equal protection, or of free speech and association provided by the United States Constitution.

## STATEMENT OF THE CASE

Under Illinois law, in the City of Chicago voters may hold a local option referendum within an individual electoral

precinct to determine whether to prohibit the sale of liquor within that precinct. *See* Ill. Rev. Stat. ch. 43 § 167 (1985). To initiate such a referendum, supporters must file a petition containing the signatures of at least twenty-five percent of the precinct's eligible "legal voters." *Id.*

Appellants, who oppose the sale of liquor in the 41st precinct of the 46th ward of Chicago, filed a petition to initiate such a referendum. Walgreen, which operates a retail store in the precinct and is licensed to sell liquor, joined with another liquor licensee to challenge the petition before the Circuit Court of Cook County because the petition contained insufficient valid signatures. The court entered summary judgment, holding that the petition circulators had not satisfied the statute's twenty-five percent signature requirement. Subsequently, the circuit court vacated the summary judgment and ruled that the twenty-five percent signature requirement was an unconstitutional burden on access to the ballot. The court therefore permitted the referendum election to be held in the 41st precinct and it was approved. On appeal, the Illinois Supreme Court reversed the lower court and held that the signature requirement did not infringe any federal constitutional rights.

## ARGUMENT

The only federal question presented by this case is whether the requirement that signatures be collected from twenty-five percent of the legal voters to initiate a referendum on prohibiting the sale of alcohol within a precinct violates principles of equal protection, or free speech and association. This is not a substantial federal question and was correctly resolved by the Illinois Supreme Court.

Decisions of this Court have consistently recognized that referendum procedures that enhance minority voting strength are not constitutionally suspect so long as no identifiable class is subjected to invidious discrimination. The

Illinois Supreme Court correctly applied that principle in upholding the twenty-five percent signature requirement.

In challenging the Illinois Supreme Court's decision, the referendum supporters rely upon authorities of this Court that are inapposite. The cases in which this Court has closely scrutinized statutes limiting candidate access to the ballot arise out of distinctive constitutional principles that are not applicable to referendum elections. Similarly, this Court's invalidation on First Amendment grounds of statutes that have infringed on *private* speech surrounding referendum elections—statutes that limit campaign expenditures or advertising relating to referendum elections—have no bearing on a challenge to the procedural mechanism for initiating the referendum itself.

## I. THE TWENTY-FIVE PERCENT SIGNATURE REQUIREMENT IS A LEGITIMATE CHECK ON SIMPLE MAJORITY RULE IN LOCAL OPTION REFERENDA.

Under Illinois law, opponents of liquor sales in a precinct within the City of Chicago face a two-step process. First, they must collect a petition with valid signatures from twenty-five percent of the precinct's legal voters; second, they must persuade a majority of the voting electorate on election day to support the referendum. Like the use of bicameral legislatures and executive vetoes, Illinois' two-part procedure for enacting local bans on alcohol sales ensures that such bans represent the considered judgment of the community as a whole and are not made with undue haste. The Illinois Supreme Court specifically found that the signature requirement was justified by the State's legitimate interest in preventing precincts from frequent and ill-considered changes in their wet/dry status:

> The State has a strong interest in maintaining the economic stability of a legally authorized industry and protecting the licensed purveyors of its products from

> irrational and capricious changes in the wet/dry status of their precincts every four years.

(Bober J.S. at 6a.)[1]

This Court has consistently recognized that a referendum election is an alternative to law-making by elected representatives. Therefore, in examining constitutional challenges to referenda procedures, the same standards apply as would apply to rules that determine how a state legislature enacts laws. Just as the process governing enactments by legislatures may incorporate checks and balances that slow down the process and enhance minority voting strength, so too may a referendum procedure.

In *Gordon* v. *Lance*, 403 U.S. 1 (1971), this Court upheld a requirement that a referendum authorizing bonded indebtedness be approved by a super-majority of the electorate; the Court reasoned that such a referendum procedure was in principle no different than if the state legislature itself were required to give super-majority approval. *Id.* at 6-7. Similarly, in *Town of Lockport* v. *Citizens for Community Action*, 430 U.S. 259 (1977), this Court upheld a statute that required referendum approval by concurrent majorities of both the city and noncity voters within the electorate, rather than simple majority approval by the aggregate of the entire electorate.

Likewise, *James* v. *Valtierra*, 402 U.S. 137 (1971), upheld a state statute that required approval by a local referendum for the construction of low income housing projects, even though no local referendum was required for authorization of other types of public housing projects. The Court refused to become entangled in closely scrutinizing "governmental structures" adopted by the states for legislating—whether referenda procedures, gubernatorial vetoes, or filibuster

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[1]The abbreviation "Bober J.S." refers to the Jurisdictional Statement filed by the appellants Dennis Bober, et al.

rules—to determine whether such legislative devices disadvantage persons who seek specific policy objectives. *Id.* at 142.

The only exception that this Court has carved out to the rule that referenda procedures are not subject to close or heightened scrutiny is when the procedures "discriminate against or authorize discrimination against any identifiable class." *Gordon*, 403 U.S. at 7. The twenty-five percent signature requirement for initiating a local option does not discriminate against any "identifiable class." Just as this Court in *Gordon* could "discern no independently identifiable group or category that favor[ed] bonded indebtedness over other forms of financing," so too there is no independently identifiable class that favors alcohol prohibition here. *Id.* at 5.

Further, the broad range of signature requirements adopted by Illinois for initiating different types of referenda demonstrates that the Illinois legislature has made thoughtful, individualized judgments with respect to specific types of public policy decisions, varying the degree to which it intends to encourage or discourage a referendum on each issue. The circuit court in this case appended to its opinion a thirty-page list of the various signature levels imposed by the Illinois General Assembly for initiating a wide variety of binding referenda. (Bober J.S. at 17a-46a.) Depending upon the subject, referenda may be initiated in Illinois by petitions containing signatures of as few as one percent of the electorate and as high as concurrent majorities of the record land owners and voters.[2] The twenty-five percent requirement for initiating a local option is the same as that imposed to initiate referenda on the dissolution of library districts

[2] For example, a referendum on organization of a river conservancy district may be initiated by petition of one percent of the electorate; a referendum on annexation of territory to a municipality requires a petition signed by concurrent majorities of the record land owners and voters. *See* Ill. Rev. Stat. ch. 24 § 7-1-2; ch. 42 § 383 (1985). The appendix to this motion contains the text of the various Illinois statutory provisions cited

*(footnote continued on next page)*

and to change a city into a village. *See* Ill. Rev. Stat. ch. 24 § 2-3-9; ch. 81 § 1002-10 (1985).

The twenty-five percent requirement for initiating local options reflects a determination by the Illinois General Assembly to make the changing of a precinct's wet/dry status somewhat difficult.[3] This is a legitimate decision for the legislature to make. The Illinois General Assembly could reasonably conclude that frequent fluctuations in a community's wet/dry status would be detrimental to the people who live in that community, the people who do business there, and the people who own property there, both residential and commercial; all of these people may be expecting that the community will retain a certain character when they choose to locate their home or business there, or buy property in that community. Likewise, the legislature could reasonably determine that establishments licensed to sell liquor—including restaurants, hotels, taverns, and retail stores—contribute to the commercial vitality of the State as a whole by generating jobs, tax revenue, and tourism. For these and other reasons, the legislature could reasonably decide to adopt a decision-making process that renders it somewhat difficult for local communities to outlaw liquor sales. This type of "balancing of interests is one for the State to resolve." *Gordon*, 403 U.S. at 7.

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*(footnote continued from preceding page)*

in this footnote and in the above paragraph. See pp. A-1 to A-2, *infra*.

[3]Once a precinct is voted dry by referendum, the same twenty-five percent signature level is required to initiate a referendum to repeal the liquor ban. *See* Ill. Rev. Stat. ch. 43 § 174 (1985).

## II. THE CONSTITUTIONAL PRINCIPLES REQUIRING CLOSE SCRUTINY OF BALLOT LIMITATIONS ON CANDIDATE ACCESS ARE NOT APPLICABLE TO REFERENDUM ELECTIONS.

The referendum supporters' principal argument in this case is that, "there is nothing in the nature of referenda that makes them, insofar as access to the ballot is concerned, less of an instrument for the exercise of the rights set forth in *Williams* [v. *Rhodes*, 393 U.S. 23 (1968)], than candidate elections." (Bober J.S. at 8.) This argument simply fails to acknowledge that this Court in *Town of Lockport* explicitly stated that procedures for referenda elections are subject to less demanding scrutiny than those for candidate elections:

> [t]he equal protection principles applicable in gauging the fairness of an election involving the choice of legislative representatives are of limited relevance . . . in analyzing the propriety of recognizing distinctive voter interests in a "single-shot" referendum.

430 U.S. at 266.

To understand why the candidate and referenda cases are different, one has to recall why the "right to vote" in candidate elections received recognition from this Court as deserving special protection: Duly enacted legislation is generally "presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne* v. *Cleburne Living Center*, 105 S.Ct. 3249, 3254 (1985). This presumption of constitutionality is "based on an assumption that the institutions of state government are structured so as to represent fairly all the people." *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621, 628 (1969). Because the presumption of statutory constitutionality initially depends on the institutions of state government being fairly structured, however, statutes structuring candidate elections are not entitled to this same degree of deference and should be closely scrutinized. *Id.* at 627-28. Starting in *Williams* v. *Rhodes*, 393 U.S. 23 (1968),

this Court therefore began closely examining, and in some cases invalidating, a variety of state statutes that imposed burdensome requirements on independent and minority party candidates for ballot access compared to candidates of major parties. *See, e.g., Anderson* v. *Celebrezze*, 460 U.S. 780 (1983); *Storer* v. *Brown*, 415 U.S. 724 (1974).[4]

In *Town of Lockport*, however, this Court expressly held that such heightened judicial scrutiny does not apply to referenda elections because the fairness or unfairness of referenda elections as to an "identifiable group of voters" is immediately apparent from the outcome without engaging in heightened scrutiny:

> In a referendum, the expression of voter will is direct, and there is no need to assure that the voters' views will be adequately represented through their representatives in the legislature. The policy impact of a referendum is also different in kind from the impact of choosing representatives—instead of sending legislators off to the state capitol to vote on a multitude of issues, the referendum puts one discrete issue to the voters. That issue is capable, at least, of being analyzed to determine whether its adoption or rejection will have a disproportionate impact on an identifiable group of voters.

430 U.S. at 266. *Town of Lockport* clearly holds that, so long as no "identifiable group" is unfairly disadvantaged, referenda procedures simply are not subject to any heightened scrutiny.

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[4] Although *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), was resolved directly under the First Amendment, rather than the Equal Protection Clause, it relied in its analysis on a number of cases decided under this "fundamental rights" strand of equal protection jurisprudence. *Id.* at 786-87 n.7.

## III. THE CASES ON CAMPAIGN FINANCING AND ADVERTISING RELATED TO REFERENDUM ELECTIONS ARE INAPPOSITE.

The referendum supporters here also rely on decisions by this Court concerning campaign financing and advertising to argue the unconstitutionality of the signature requirement. They cite *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290 (1981), and *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), for the proposition that referenda also are entitled to protection under the First Amendment. (Bober J.S. at 8.)

There is no disputing that supporters and opponents of referenda measures are entitled to the full panoply of rights accorded by the First Amendment. Those rights include the right to publicize their views through advertisements, as recognized in *Bellotti*, and to effectively disseminate those views by monetary contributions to political associations, as recognized in *Citizens*. Laws that restrict *private* speech and association surrounding any political topic, including private speech concerning a referendum proposal, constitute an infringement of First Amendment rights.

This case does not involve any restraint on private speech or association surrounding a referendum, however. Rather, the appellants here are objecting to a signature requirement that is an integral part of the substantive process for enactment of the referendum itself. To label this legislative device an infringement of First Amendment rights is like calling a gubernatorial veto or a filibuster rule an infringement of First Amendment rights. Although not explicitly couched in terms of the First Amendment, this Court's decisions in *Gordon* and *James* make it clear that, absent discrimination against an identifiable class, this Court will not become entangled in closely scrutinizing the legislative devices adopted by the States, including their referenda procedures.

## IV. THE TWENTY-FIVE PERCENT SIGNATURE REQUIREMENT IS VALID EVEN UNDER THE STANDARD THAT APPELLANTS WOULD APPLY.

Moreover, the appellants' characterization of the twenty five percent signature requirement as a "brutally high barrier" is gross hyperbole. (Bober J.S. at 9-10.) Many precincts in Chicago have held successful local options by complying with this so-called "brutally high barrier." Indeed, a review of the reported cases, alone, between 1970 and 1985 shows that at least thirty-five precincts held valid local option elections in that period. (See list appended to this motion, pp. A-3 to A-4, *infra.*) The Court may take judicial notice of those thirty-five successful local options. *See* F.R.E. 201(b)(2) & (f) (Court may take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" at any stage of proceedings).

When, on average, referenda supporters in more than two precincts per year have successfully initiated local options, it is apparent that "reasonably diligent" people are able to satisfy the signature requirement, and that local options "have qualified [for the ballot] with some regularity." *See Storer* v. *Brown*, 415 U.S. 724, 742 (1974). This is the standard dictated by *Storer*, one of the principal cases concerning candidate access to the ballot relied upon by appellants. (See Bober J.S. at 6, 9.) Thus, even under this more exacting standard, the twenty-five percent signature requirement does not violate any First or Fourteenth Amendment rights.[5]

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[5] In any event, there is no evidence in the record to support appellants' contention that the signature requirement is "brutally high." The constitutional challenge was not raised by appellants until eight days before the election. (Bober J.S. at 9a.) Because of the need to resolve the question on such short notice and because the circuit court believed that the frequency with which local options have been held "merely begs the question," there was no evidence submitted on this point by either side. (*Id.* at 12a.)

## CONCLUSION

WHEREFORE, Walgreen Co. respectfully requests that this Court dismiss this appeal. The Supreme Court of Illinois properly held that the twenty-five percent signature requirement for initiating local option referenda does not deprive appellants of equal protection, or freedom of speech and association. No substantial federal question is raised by this appeal.

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# APPENDIX

## APPENDIX

Ill. Rev. Stat. ch. 24 § 2-3-9 (1985) provides in relevant part:

> Upon the filing of a petition signed by one-fourth of the registered voters of any city, the city clerk shall certify, in the manner provided by the general election law the question of whether the city shall incorporate as a village, to the proper election authorities who shall submit the question at an election in accordance with the general election law.

Ill. Rev. Stat. ch. 24 § 7-1-2 (1985) provides in relevant part:

> A written petition signed by a majority of the owners of record of land in such territory, and also by a majority of the electors, if any, residing in such territory, shall be filed with the circuit court clerk of the county in which the territory is located. . . . The petition or ordinance, as the case may be, shall request the annexation of the territory to a specified municipality and also shall request that the circuit court of the specified county submit the question of the annexation to the corporate authorities of the annexing municipality or to the electors of the unincorporated territory, as the case may be.

Ill. Rev. Stat. ch. 42 § 383 (1985) provides in relevant part:

> One per cent or more of the legal voters resident within the limits of such proposed [river conservancy] district may petition the circuit court for the county which contains all or the largest portion of the proposed district to cause the question to be submitted to the legal voters of such proposed district, whether such proposed territory shall be organized as a conservancy district under this Act.

Ill. Rev. Stat. ch. 81 § 1002-10 (1985) provides in relevant part:

> Dissolution of a [library] district may be accomplished in the manner following:
>
> 25% but not less than 100 of the voters of a district may petition the Circuit Court of the county which contains all or a greater portion of the district than any other county having territory therein, to order the question of dissolution to be submitted to the voters of the district.

# PRECINCTS HOLDING VALID LOCAL OPTIONS THAT HAVE BEEN REPORTED IN ILLINOIS AND FEDERAL CASES SINCE 1970

| Precinct Holding Local Option | Case In Which Reported |
|---|---|
| 17th Precinct of 6th Ward | *Love* v. *Marcin*, 47 Ill. App. 3d 715, 365 N.E.2d 100 (1977) |
| 21st Precinct of 6th Ward | *Seals* v. *City of Chicago*, 93 Ill. App. 3d 618, 417 N. E. 2d 843 (1981) |
| 46th Precinct of 6th Ward | *Duncan* v. *Marcin*, 82 Ill. App. 3d 963, 403 N.E.2d 653 (1980) |
| 2nd Precinct of 7th Ward | *Cooper* v. *Marcin*, 44 Ill. App. 3d 918, 358 N.E.2d 1218 (1976) |
| 3rd Precinct of 7th Ward | *Huguley* v. *Marcin*, 39 Ill. App. 3d 230, 349 N.E.2d 564 (1976) |
| 4th Precinct of 7th Ward | *Cooper* v. *Marcin*, 44 Ill. App. 3d 918, 358 N.E.2d 1218 (1976) |
| 12th Precinct of 7th Ward | *Hall* v. *Marcin*, 49 Ill. App. 3d 528, 364 N.E.2d 549 (1977) |
| 23rd Precinct of 7th Ward | *Cooper* v. *Marcin*, 44 Ill. App. 3d 918, 358 N.E.2d 1218 (1976) |
| 28th Precinct of 7th Ward | *Cooper* v. *Marcin*, 44 Ill. App. 3d 918, 358 N.E.2d 1218 (1976) |
| 7th Precinct of 8th Ward | *Hassiepen* v. *Marcin*, 22 Ill. App. 3d 433, 318 N.E.2d 162 (1974) |
| 47th Precinct of 8th Ward | *Schultz* v. *Marcin*, 8 Ill. App. 3d 91, 289 N.E.2d 286 (1972) |
| 96th Precinct of 8th Ward | *Vanderbilt* v. *Marcin*, 127 Ill. App. 2d 192, 262 N.E.2d 42 (1970) |
| 1st Precinct of 9th Ward | *Hall* v. *Marcin*, 49 Ill. App. 3d 528, 364 N.E.2d 549 (1977) |
| 5th Precinct of 9th Ward | *Robertson* v. *Marcin*, 50 Ill. App. 3d 390, 365 N.E.2d 709 (1977) |
| 68th Precinct of 10th Ward | *Cummings* v. *Marcin*, 16 Ill. App. 3d 18, 305 N.E.2d 606 (1973) |
| 38th Precinct of 16th Ward | *Havlik* v. *Marcin*, 132 Ill. App. 2d 532, 270 N.E.2d 189 (1971) |
| 6th Precinct of 19th Ward | *Rafferty* v. *Marcin*, 44 Ill. App. 3d 930, 358 N.E.2d 1276 (1976) |
| 1st Precinct of 21st Ward | *Love* v. *Marcin*, 47 Ill. App. 3d 715, 365 N.E.2d 100 (1977) |
| 49th Precinct of 21st Ward | *Liquor Hut, Inc.* v. *Marcin*, 84 Ill. App. 3d 718, 406 N.E.2d 139 (1980) |

| Precinct Holding Local Option | Case In Which Reported |
|---|---|
| 40th Precinct of 29th Ward | *Love* v. *Marcin*, 47 Ill. App. 3d 715, 365 N.E.2d 100 (1977) |
| 3rd Precinct of 34th Ward | *Ye Olde Shamrock, Ltd.* v. *Marcin*, 95 Ill. App. 3d 953, 420 N.E.2d 434 (1981) |
| 45th Precinct of 36th Ward | *Ye Olde Shamrock, Ltd.* v. *Marcin*, 95 Ill. App. 3d 953, 420 N.E.2D 434 (1981) |
| 2nd Precinct of 46th Ward | *Schierhorn* v. *Marcin*, 10 Ill. App. 3d 551, 294 N.E.2d 771 (1973) |
| 38th Precinct of 46th Ward | *Schierhorn* v. *Marcin*, 10 Ill. App. 3d 551, 294 N.E.2d 771 (1973) |
| 44th Precinct of 48th Ward | *Ye Olde Shamrock, Ltd.* v. *Marcin*, 95 Ill. App. 3d 953, 420 N.E.2d 434 (1981) |
| 2nd Precinct of 50th Ward | *Young* v. *Marcin*, 66 Ill. App. 3d 576, 384 N.E.2d 404 (1978) |
| 1 Unidentified Precinct | *Zelinka* v. *City of Chicago*, 10 Ill. App. 3d 676, 294 N.E.2d 740 (1972) |
| 4 Unidentified Precincts | *Malito* v. *Marcin*, 14 Ill. App. 3d 658, 303 N.E.2d. 262 (1973) |
| 2 Unidentified Precincts | *Walker* v. *Marcin*, 24 Ill. App. 3d 791, 321 N.E.2d 406 (1974) |
| 2 Unidentified Precincts | *Philly's* v. *Byrne*, 732 F.2d 87 (7th Cir. 1984) |